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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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IN THE MATTER OF THE APPLICATION OF
SOLARCITY FOR A DETERMINATION THAT
WHEN IT PROVIDES SOLAR SERVICE TO
ARIZONA SCHOOLS, GOVERNMENTS, AND
NON-PROFIT ENTITIES IT IS NOT ACTING AS
A PUBLIC SERVICE CORPORATION
PURSUANT TO ART. 15, SECTION 2 OF THE
ARIZONA CONSTITUTION.

DOCKET NO. E-20690A-09-0346

**REPLY BRIEF OF
TUCSON ELECTRIC POWER
COMPANY
AND UNS ELECTRIC, INC.**

Tucson Electric Power Company and UNS Electric, Inc., collectively referred to as "the Companies", through undersigned counsel, hereby respectfully submit their Reply Brief as follows:

I. INTRODUCTION.

The determination of whether SolarCity is a public service corporation under the Arizona Constitution is a legal issue governed by existing Arizona law. While there is general consensus as to the applicable analysis, the parties diverge on the appropriate conclusion. When the legal analysis is properly applied to the facts, it is clear that SolarCity is a public service corporation that should be subject to regulation by the Arizona Corporation Commission. On the other hand, those who argue against treating SolarCity as a public service corporation often focus on non-legal elements, such as a desire not to hinder the development of distributed solar generation or the potential complexity of regulation.

The primary purpose of the SolarCity Solar Service Agreement ("SSA") is to provide electricity to the end user customer. The provision of electricity is not incidental to the construction, operation and maintenance of the solar facilities; it is the ultimate purpose of SolarCity's activities. Without the provision of that electricity, there would be no need for the

1 SSA. SolarCity absolutely controls the operation, maintenance, metering of electricity output and
2 billing for electricity provided to the customer. Moreover, once the SolarCity facilities are
3 installed on a customer's premises, that customer becomes a captive customer with little, if any,
4 ability to switch to another on-premises renewable energy provider. Further, the SSA is wholly
5 dependent on incentives that are funded by the public.

6 Given these facts, SolarCity is a public service corporation. The provision of electricity by
7 SolarCity renders the "rates, charges and methods of operation a matter of public concern" that are
8 sufficiently "clothed with a public interest to the extent clearly contemplated by law which
9 subjects it to government control." *Gen. Alarm, Inc. v. Underdown*, 76 Ariz. 235, 262 P.2d 671,
10 675 (1953); see *Southwest Transmission Cooperative, Inc. v. Arizona Corporation Commission*,
11 213 Ariz. 427, 431, 142 P.3d. 1240, 1244 (2006) ("*Southwest Transmission*"). Accordingly, there
12 is a real need to, among other things: (i) ensure the continuity of the operation and maintenance of
13 the system; (ii) ensure that SolarCity is accurately determining the amount of electricity produced
14 by the system and properly billing for that electricity; (iii) ensure there is appropriate customer
15 service and consumer protection for the electric service; and (iv) ensure there is an efficient and
16 qualified forum for the resolution of customer issues arising from the provision of the electricity.
17 These needs are ongoing and extend beyond the initial installation of the solar system. The
18 Commission is the appropriate government agency under the Arizona Constitution to oversee and
19 regulate such businesses and activities.

20 **II. THE DETERMINATION THAT SOLARCITY IS A PUBLIC SERVICE** 21 **CORPORATION IS A LEGAL CONCLUSION.**

22 No party disputes that this docket presents a legal issue that must be decided. Most parties
23 applied the legal analysis set forth in *Southwest Transmission* in arguing whether SolarCity is a
24 public service corporation. However, the parties arguing against public service corporation status
25 drift away from legal analysis. For example, they assert that increasing distributed solar
26 generation is an important public policy that should not be hindered by regulation; however, this
27 does not excuse or pre-empt constitutional requirements.

1 The legal question raised in this case should be decided on legal grounds and not purported
2 public policy claims.

3 **III. SOLARCITY IS A PUBLIC SERVICE CORPORATION.**

4 In their initial briefs, several parties suggest that the SolarCity method of providing electric
5 service is not a matter of public concern and does not require any level of ongoing regulation.
6 Ironically, they either assert or imply that the public benefit of increasing distributed solar
7 generation in Arizona actually should tilt the scale *against* treating the distributed solar generators
8 providing electricity to retail consumers as public service corporations. In arguing against
9 regulation, the parties' primary positions include assertions that: (i) the provision of distributed
10 solar generation does not implicate public concerns, (ii) SolarCity is not "furnishing" electricity,
11 (iii) the SolarCity model is a financing arrangement and not the provision of electricity and (iv)
12 there is no need for -- and no benefit from -- Commission regulation. However, none of these
13 rationales for excusing SolarCity from regulation as a public service corporation are well founded
14 in law or in fact. Moreover, these parties seem to imply that regulation is contrary to the public
15 interest, while just the opposite it true.

16 **A. The SSA is a Matter of Public Concern.**

17 The primary purpose of the SSA is to provide electricity to the end user customer.
18 SolarCity constructs, owns, operates and maintains its solar facilities at the customer's premises.
19 It charges the end user customer for the electricity produced by its system. But for the provision
20 of electricity, the customer would have no need for SolarCity's service. SolarCity wholly controls
21 the operation, maintenance, metering of electricity output and billing for electricity provided to the
22 customer. The customer is at the mercy of SolarCity for the continuing operation of the facility,
23 for the accurate reading of the meter recording electricity produced and for the proper billing of
24 charges for the electricity. Moreover, the electricity provided by SolarCity offsets the electricity
25 required from the incumbent provider. If a customer believes that it is being charged for too much
26 electricity, it becomes a matter of concern for the customer, the incumbent electric provider,
27 SolarCity and the Commission.

1 Once the SolarCity facilities are installed on a customer's premises, that customer becomes
2 a captive customer with little, if any, ability to switch distributed renewable energy providers.
3 This circumstance is strikingly similar to a customer's ability to change its incumbent electric
4 provider. The customer remains bound to pay for electricity from both providers. And the
5 customer's recourse in any dispute over the provision of that electricity is limited. Continuity of
6 service, billing disputes and other customer service concerns must be addressed to the provider
7 and having an effective forum to resolve such disputes is of significant public concern.

8 Further, the SolarCity method of service is wholly dependent at this time on incentives that
9 are funded by the public. The REST incentives provided by the incumbent utilities are funded by
10 ratepayers. Tax credits also are ultimately supported by the tax payers. To accept incentives
11 funded by the public and then refuse even modest oversight and regulation of the provision of a
12 public commodity such as electricity is untenable.

13 **B. SolarCity is Furnishing Electricity.**

14 SolarCity and others assert that SolarCity is not "furnishing" electricity as required by
15 Article 15, Section 2 of the Arizona Constitution. SolarCity contends that it never possesses the
16 electricity; rather the customer owns the electricity as soon as it is produced. This is a distinction
17 without merit. SolarCity does not acknowledge or address the potential regulatory issues that may
18 ensue if a generator could excuse itself from regulation simply by manipulating the temporal
19 ownership of electrons. Even if SolarCity never owns the electricity, this does not negate the fact
20 that its solar panels produce the electricity and that electricity is then transported through the
21 SolarCity facilities (cabling and inverter) from the solar panels to the customer's electric panels.
22 Under *Southwest Transmission* even that is sufficient to meet the definition of "furnishing." See
23 *Southwest Transmission*, 142 P.3d at 1244.

24 **C. The SolarCity SSA is not a Financing Arrangement.**

25 SolarCity and others argue that the SSA is actually a financing arrangement to allow the
26 construction of the solar facilities, not an arrangement for the provision of electricity to the end
27 user customer. However, the SSA clearly is not a financing arrangement for the end user

1 customer. The end user customer does not own the system; SolarCity does. The SSA may
2 provide SolarCity the ability to obtain sufficient incentives and tax credits to construct the
3 distributed generation. This is little different than a utility-scale project developer using a PPA
4 with a power purchaser to support the financing for the project. The end user is still simply
5 purchasing the electricity provided by the solar facilities owned and operated by SolarCity. No
6 more, no less.

7 **D. There are Substantial Benefits from Regulation.**

8 None of the parties have disputed that SolarCity owns, operates and maintains the
9 distributed solar facilities. None of the parties have disputed that SolarCity reads the meter and
10 bills the end user customer based on that reading. None of the parties have asserted that there will
11 be no disputes over continuity of operations or over inaccurate billings or over other issues.
12 However, some parties assert that there is no need for -- and no benefit from -- some oversight and
13 regulation of SolarCity. Several parties have suggested that the Registrar of Contractors or the
14 courts might provide sufficient regulatory oversight and dispute resolution. These venues,
15 however, do not pre-empt the constitutional origin and jurisdiction of the Commission over
16 SolarCity. Also, the nature and duration of the relationship between SolarCity and the end user
17 customer for the provision of electricity belies such assertions. Given the provision of electricity
18 to a captive customer, there is continuing need for oversight well beyond the initial construction of
19 the solar facilities. Forcing customers to resort to the court system to pursue disputes over the
20 ongoing service, such as continuity of operation or billing, is uneconomical, inefficient and
21 burdensome to the customer.

22 Proper regulatory oversight by the Commission will efficiently and effectively: (i) ensure
23 the continuity of the operation and maintenance of the system; (ii) ensure that SolarCity is
24 properly calculating the electricity produced by the system and the bills for that electricity; (iii)
25 ensure there is appropriate customer service and consumer protection; and (iv) ensure there is an
26 efficient and qualified forum for the resolution of customer issues arising from the provision of the
27 electricity. These needs are ongoing and extend beyond the initial installation of the solar system.

1 And the Commission is the appropriate entity with authority under the Arizona Constitution -- and
2 with the necessary expertise -- to oversee and regulate such businesses and activities.

3 These concerns -- and the clear public benefits that will arise from Commission regulation
4 and oversight -- confirm that SolarCity's business and activities are sufficiently "clothed with a
5 public interest" to make its "rates, charges and methods of operation a matter of public concern."
6 As such, SolarCity is a public service corporation under the Arizona Constitution that is subject to
7 Commission regulation.

8 The Companies do not propose the precise nature of regulation that should be imposed by
9 the Commission and defer to the Commission's view as to what is necessary to protect the
10 individual consumers and the public interest.

11 **IV. CONCLUSION.**

12 Based on the evidence, the facts and applicable law are clear that SolarCity is a public
13 service corporation subject the Commission's jurisdiction and regulatory oversight. The
14 Commission's clear determination of this legal matter will provide certainty and protection for
15 both SolarCity and Arizona customers.

16 RESPECTFULLY SUBMITTED this 15th day of January 2010.

17 **TUCSON ELECTRIC POWER COMPANY AND**
18 **UNS ELECTRIC, INC.**

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